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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 270

WALTER ROUSE,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND AND BRIEF IN SUPPORT THEREOF

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OCTOBER TERM, 1953

No. ------

WALTER ROUSE,

Petitioner,

VS.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

TO THE HONORABLE, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Walter Rouse, respectfully prays for a Writ of Certiorari to the Court of Appeals of Maryland the judgment of the Court of Appeals of Maryland, entered in the above entitled cause, on the 11th day of June, 1953.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

The Indictment (No. 3393) in the instant case, charged that Walter Rouse, the Petitioner, conspired with William Adams and with divers other persons to the grand jurors unknown, continuously from August 1, 1947 until August 15, 1951, to violate the lottery laws of the State of Maryland.

At the outset a motion to dismiss the indictment was filed on the ground of res judicata based on the absolute identity of the proof to be offered in the instant case with that previously offered in the trial of the Petitioner and others under a series of indictments charging them jointly with violations of the lottery laws of the State of Maryland in which earlier trial the Petitioner herein together with a number of other defendants pleaded guilty generally to said indictments.

The Court in said earlier trial in fixing sentence noted the fact that the proof showed a city-wide operation in violation of the lottery laws, although the Court did not designate same as a conspiracy.

Because of the magnitude of the operation, the vast numbers of persons involved and the extent in area and time of the operation, the sentence was [illegible] imposed on the Petitioner and other defendants, was a fine of $10,000, which the Court stated was ten times greater than would have been imposed in any ordinary violation of said lottery laws.

The same witness for the prosecution who testified as to the circumstances in the earlier case, testified to the same effect in the instant case. The Petitioner herein and a number of those jointly indicted with them in the earlier case, who pleaded guilty therein, were called by the State to admit their guilt in the instant case, and being compellable by law to testify admitted their participation and respective pleas of guilty in said earlier cases.

The Petitioner herein contends that said earlier trial is a bar to the prosecution of the instant case, that the imposition of a sentence in the instant case constitutes double

punishment for the same crime and that the instant case is violative of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

1. The Maryland Court of Appeals erred in holding that the conspiracy to violate the lottery laws of the State of Maryland had not been proven at the trial of the earlier indictments.

2. The Maryland Court of Appeals ignored the fact that the Trial Court in fixing sentence at the trial of the earlier indictment increased same ten-fold over what he customarily imposed, because the evidence proved not an isolated violation of the lottery laws, but a city-wide combination of vast members of participants, in addition to those jointly indicted, and covering a long period of time.

WHEREFORE your Petitioner prays that a writ of Certiorari issue to the Court of Appeals of Maryland, commanding that Court to certify and send to this Court, on a day to be determined, a full and complete transcript of the record of all the proceedings of such Court of Appeals, had in this case, to the end that the judgment of the Court of Appeals of Maryland may be reversed, and that the Petitioner be granted such other and further relief as may seem proper.

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Respondent.

BRIEF IN SUPPORT OF PETITION

STATEMENT OF THE CASE

The Indictment herein (No. 3393 of 1951) contains but one count, charging that the Appellant (Petitioner) conspired together with William Adams and together with divers unknown persons, to violate the lottery laws of the State of Maryland (App. 2-3). A severance was granted to Walter Rouse.

At the outset of the trial, a motion of res judicata was filed to bar the prosecution under said indictment on the ground that the conspiracy charged had previously, to wit, on March 20, 1950, been proven under Indictments Nos. 5545, 5546, 5547, 5548, 5549 and 5550, charging the said defendants and others jointly with violations of the lottery laws of the State of Maryland (the substantive of-

fenses) and that the evidence which the State intended to use in this case consisted of the same evidence used in said earlier trial, in which said Walter Rouse had been held guilty and sentenced. Said Motion was overruled (App. 3-6).

The evidence at the trial of the instant case was identical as to facts proven with that in said earlier trial, as to circumstances, person involved, documentary and physical evidence and real nature of the offense.

While the Indictments in the earlier trial charged the substantive offense, the Appellant Rouse and other co-defendants therein, were expressly punished for a combination and confederation in the nature of a conspiracy to violate the lottery laws, though the word "conspiracy" was not used in imposing sentence.

On December 2, 1952, the Court entered a judgment as to Walter Rouse (Petitioner) of three (3) years in the Maryland Penitentiary and fined $2,000.00 (App. 2).

On June 11, 1953, the Maryland Court of Appeals rendered an Opinion affirming the judgment and sentence.

SPECIFICATION OF ERROR

(a) The Court of Appeals of Maryland erred in upholding the denial of Appellant's (Petitioner's) Motion res judicata to bar prosecution under indictment charging conspiracy to violate the State's lottery laws, where there was no evidence of such conspiracy, except insofar as the unlawful agreement could be inferred from his having participated in the substantive crime of lottery, of which offense Appellant had previously been convicted upon the same identical evidence.

(b) The Court of Appeals of Maryland erred in upholding Appellant's conviction and sentence for conspiracy to violate the State's lottery laws, where he had previously been convicted upon the same identical evidence for the substantive crime, and the sentence in said earlier case was expressly based upon the fact that the substantive crime proven was city-wide in scope and participated in by divers unknown persons in addition to the eighteen persons jointly indicted therefor, although the word "conspiracy" was not used.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment XIV:

> "Sec. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARGUMENT

1. Although the offense charged in Indictments Nos. 5545-46-47-48-49-50 of 1949 was that of violations of the Lottery Laws of the State of Maryland, the offense proven at the trial on March 20, 1950 upon said Indictments, was the identical completed conspiracy proven in the instant case.

The prosecutions stemmed from a raid made on November 19, 1949, on the premises No. 2006 West North Avenue, by Captain Alexander Emerson and two other members of

the Vice Squad, at which time were seized large quantities of lottery tickets, lottery slips, lottery takes, money, and electrically operated adding machines, all of which were found in the cellar upon a table and seated thereat, in close juxtaposition to Walter Rouse (John Roush), Randolph Fortune, Carlos Hutchins, Clyde Martin, Noland Clark, John (James) Payne, Joseph Quill, Charles Dodson, Morris Fox, Henry Baker, and Frank Reddish.

At the trial on March 20, 1950, under Indictments Nos. 5545, 5546, 5547, 5548, 5549 and 5550, charging various violations of the lottery laws of the State of Maryland, all the above named defendants, save only Morris Fox pleaded guilty generally to Indictment No. 5545. Morris Fox pleaded guilty as a player. In addition, Henry Taylor pleaded guilty to renting the premises for lottery purposes.

The sole witness at the trial on March 20, 1950, was Captain Emerson. His testimony was read into the record in the instant case by Mr. Salzman, the court stenographer, reading from the transcript made by him at said trial (App. 30-40). All of said testimony related to the raid and search and seizure made at No. 2006 West North Avenue on November 19, 1949. After describing how he entered the premises by the front door, and found there in the kitchen Henry Taylor, the tenant of the premses, his wife, Louise Taylor, Edmonio Wilson, and Pearl Benton, and the finding of small quantities of lottery tickets and money, the attention of the witness was directed to the cellar or basement.

> "Q. Will you describe to his Honor what you found in the basement when you got down there? A. I think it was seven card tables pushed together making one solid table, and a table to the end pushed up against that; two tables to the west side of the cellar, and the

steps leading down, and this is in the front part of the cellar; and two boxes, that is these two boxes here that were locked; they were both on the west side of the cellar. These men were all seated around with some of them electrically equipped adding machines."

"(The Court) A pick-up station?

"(The Witness) No, sir, this is the headquarters.

"(By Mr. Murrell) Now, let's take the defendants in order. Take John Roush first. John Roush has pleaded guilty generally to all 6 days. John Roush had $44.20 in cash in his pocket, four checks amounting to $956.82, which we left him keep. In front of him he had $210.40 mixed up with lottery slips. He had 45 writers, 1,281 slips, 15,372 numbers, $810.23 played on same. He stated he had been there three days.

"Q. Next is Frank Reddish. He had no money in his pocket. He had several syndicate cards in his shirt pocket, that is, lottery syndicate cards, explaining the odds that they would not pay off. He had in front of him, wrapped up with lottery slips, $176.67. He had a bundle of lottery tapes in his overcoat pocket. In front of him he had 54 writers, 1,224 slips, 12,440 numbers, $930.76 played, and three lottery syndicate cards, 10 lottery tapes amounting to $1,952.29.

"Q. He had an adding machine in front of him, did he not, Captain? These electrical adding machines, where were they plugged in? A. From the ceiling. And they had big, large lights down there, and droplight, so they could easily see to it that no mistake was made.

"Q. Who is next? A. Henry Baker. I took from his pocketbook one lot of lottery tapes amounting to 19 different stations, $11,253.23. He had $25.45 in cash in front of him mixed up with the lottery slips. He had 16 stations, 359 slips, 2,813 numbers, $250.39 played on same. Stated he had been working there three days.

"Joseph Quill—

"Q. Captain, the order you are calling them out is the order they were seated at these tables, isn't that

correct? A. That is correct. Quill was seated across from Baker on the west side of the table. He stated he had been there three months first, and then he changed it to four days. He had $250.32 in cash in front of him wrapped up with the lottery slips. His lottery slips amounted to 34 writers, 714 slips, 9,210 numbers, $338.10 played. Taken from his pocket, one book with several stations, with Tuesday and Wednesday in same. They had to be there longer than four days.

"(Mr. Perkins) We object to that, although we had pled guilty.

"A. Morris Fox stated he had been there four days. He was on the west side of the table in front of Fortune. Fortune was on the east side. Morris Fox had $784 in cash in his pocket. I left him keep that. He had slips in front of him representing 10 writers, 115 slips, 1,380 numbers, $169.32. He had $323.71 in cash in front of him mixed up with the lottery slips.

"Q. He was the only white person there? A. That is correct.

"Q. Of the defendants? A. That is correct.

"Next was Randolph Fortune. He stated he had been there three days, and he was on the south side. He was working with an adding machine. He had slips totaling 30 writers, 625 slips, 3,329 numbers, $4,095.84 played on same. He had $13.80 in U. S. currency in front of him mixed up with the lottery slips.

"Next was John Payne. He stated he had been there two days. He had $146 in cash and $17 in change in his pocket. I left him keep that. He had $63 in cash in front of him which I seized. He had 321 lottery slips, 3,496 numbers, $1,214.50 played. He had 95 writers, 16 lottery tapes amounting to $15,223.90.

"Carlos Hutchins stated he had been there two or three days before this one. He had $52.75 in his pocket which I left him keep. He had wrapped up with the lottery slips $257.77 in cash. He had 113 lottery slips,

1,195 numbers, $159.37 played, one adding machine that he was working on.

"Next was Nolan Clark. He said he had been there two days, this making three. He had $258 in bills, and $5 in change which I left him keep. In front of him, mixed up with the lottery tickets and a book was $268.47. He had one adding machine that he was workin with; 35 writers, 523 slips, 7,845 numbers, $711.89 played on same. One book with different writers' stations in it.

"Charles Dodson. He stated he had been there one day before. He had $63.62 in cash in his pocket, which I left him keep. On the table wrapped up with the lottery slips he had $178.37 in cash. He had 49 writers, 1,443 slips, 15,518 numbers, $1,412.62 played on same; one lottery syndicate card.

"Q. For Monday, November — A. For Monday, November 14, '49, I found in front of Clyde Martin, 53 slips, 286 numbers, $36.90 played. For Tuesday, November 15th, 1949, 42 slips, 105 numbers, $26.52. For Wednesday, the 16th of November, 1949, 40 slips, 158 numbers, $26.48. For Thursday, November 17, 1949, 39 slips, 154 numbers, $24.91. For Friday, November 18th, 1949, 47 slips, 264 numbers, $31.60 played" (App. 32-35).

Captain Emerson further testified that there was a grand total of 907 writers, 24,494 slips, 268,182 numbers, $15,807.35. In addition, there were 47 lottery tapes amounting to $27,477.21, making a grand total of all, $43,284.06 (App. 35).

* * * * * *

"(Mr. Murrell) You have got Mr. Roush now, who has pled guilty to everything. You have got two boxes there that are full of thousands of lottery slips. If he has pled guilty generally to all of these days, then Captain Emerson ought to get those two boxes into evidence now with respect to what was found on the premises.

* * * * * *

"(The Court) He has included those, if you want to offer them in evidence I imagine that will be all right, too.

"(Mr. Murrell) The one box contains lottery slips for November 17, and the other contains lottery slips for November 18th. One box has 97,000 numbers in it, the other has 96,000 numbers in it" (App. 35-36).

At the conclusion of this testimony, the Court, among others, found guilty generally under indictment No. 5545, Walter Rouse, Frank Reddish, Randolph Fortune, Noland Clark, Charles Edward Dodson, Clyde Martin, John (James) Payne and Morris Fox and imposed as a sentence a fine of $1,000 on each of them.

After imposing sentences, Judge Manley said:

"I might say I look upon this case as being different from the ordinary case where the person is picked up on the street or in the store somewhere, a pick-up station where he is writing numbers, and the fine has usually been a hundred dollars, that is the first time he had been in this Court this year. But this case is entirely different, and while I have been lenient in the other type of case, I think in a case like this I should strictly enforce the law because this probably may be an opportunity to break up the headquarters of an organization that is probably spread out all over the city, and the only ones Captain Emerson got there were probably the pick-up men who had all these tickets in their possession, and who come there from the turn-in posts spread throughout the city" (App. 39-40).

Thereafter, to wit, on the 24th day of August, 1951, the indictment in the instant case, No. 3393, was returned. It charged that Walter Rouse conspired together with said

William Adams, and together with divers unknown persons to violate the lotter laws of the State of Maryland continuously from August 1, 1947, until August 15, 1951 (App. 2-3). A severance was granted to Walter Rouse.

At the trial, the evidence related solely to the conditions found on the premises 2006 West North Avenue on November 19, 1949 and a few days prior thereto. No attempt was made to show any facts tending to show conspiracy to violate the lottery laws by said William Rouse with said William Adams or with any unknown person at any time, except on November 19, 1949, and for several days prior thereto. Thus Captain Emerson's testimony as to what he found when he entered and searched the premises No. 2006 West North Avenue, including the cellar thereof, corroborates in detail the testimony he gave in the trial of said six Indictments on March 20, 1950 (App. 6-13). It could not be otherwise, since Captain Emerson, in testifying, read from notes which he made at the time of said raid.

The following witnesses then testified, each admitting that he was arrested in the raid at No. 2006 West North Avenue, on November 19, 1949; that they were tried, plead guilty, and respectively fined $1,000.00, which was paid, but not by the witness: Frank Reddish (App. 16-19); Randolph Fortune (App. 19-20); Noland Clark (App. 22-23); Charles Edward Dodson (App. 23-25); Henry Taylor (App. 25-26); Clyde Martin (App. 26-27); John (James) Payne (App. 28-29); Morris Fox, who testified he was only a player; that he was tried on March 20, 1949, and was fined $1,000.00, which was paid, but not by him, and not at his request (App. 21-22).

The trial court, at the request of the defendant, Rouse, here permitted the introduction in evidence of the entire

stenographic transcript of the notes of Mr. Salzman, taken at the hearing of the cases, Indictments Nos. 5545-46-47-48-49 and 50, before his Honor, Judge Manley. Mr. Salzman stated that so far as his notes showed, there was only one witness, Captain Emerson (App. 29). Said transcript of the testimony of Captain Emerson, as read by Mr. Salzman, corresponds accurately with his testimony given in the instant case as to the persons, things, and surrounding circumstances found to exist at No. 2006 West North Avenue, on November 19, 1949 (App. 30-37).

Walter Rouse, the Appellant, then testified that he is forty-three years old; he has never been convicted of any crime, excepting the lottery conviction on March 20, 1950; he has lived in Maryland since 1937. He was a partner at the Club 1017 from 1947 to November 9, 1949, at which time he sold out his interest to his partner, Myrtle C. Burns, for $17,000.00, of which $3,000.00 was paid in cash (App. 40-41). That about November 14, 1949, Johnny Payne and Randolph Fortune, the fellows who were already in the lottery business at No. 2006 West North Avenue, came to him to get him to take over the business, because they thought he had some money; he had $3,000.00 but he didn't have to put it up as no hit was made during the three days he was in charge, until the raid on November 19, 1949. He paid for the bails of the men arrested with him on that occasion; he paid for all the lawyers, except Lawyer Siegel, and the lawyer for Morris Fox; he paid all the moneys for the fines, amounting to $14,900.00; he did so because he understood that otherwise he would be the man to go to jail (App. 42-45). He took over the business that was already there at No. 2006 West North Avenue; he didn't have a partner; he didn't have a backer; he didn't know who had the keys to the two boxes in the cellar; he didn't

know where Captain Emerson got the keys, from Willie Adams or elsewhere (App. 45-48).

James A. Cole, Clerk of the Court at the time of trial on March 20, 1950, then read to the jury the disposition of Indictments Nos. 5545-46-47-48-49-50 of 1949, including the pleas of the various defendants, the verdicts and fines imposed on each one except Pearl Benton, who was found not guilty, and William Adams, who prayed a jury trial and was found not guilty (App. 48-54).

Captain Emerson, recalled as a witness, testified that he got the keys to open the two boxes in the cellar from William Adams; that he called attention to this in a loud voice, in the presence of Appellant, and then proceeded, while in the cellar in the presence of all the prisoners, to open one of the boxes, the other box was opened at Headquarters (App. 54-56).

2. The sentence of three (3) years in the Maryland Penitentiary imposed upon the Appellant in the instant case constitutes double punishment for the same offense.

As shown hereinabove at the trial on March 20, 1950, the Appellant, as well as those found with him in the cellar at No. 2006 West North Avenue on November 19, 1949, seated at the small tables with piles of lottery slips, numbers, and moneys, and electric adding machines in front of them pleaded guilty generally to Indictment No. 5545. Thereafter, Captain Emerson, who conducted the search of said premises on November 19, 1949, testified so as to show by inference the magnitude of the lottery operation in which said men were active participants. His testimony proved that each of said men were caught red-handed as confederates and co-conspirators, in the operation of this large, widespread lottery operation, which obviously could

not operate without their continued cooperation. There was no direct evidence that any one of these men had written or sold any lottery tickets; or that any one of them was a pick-up man; nor any evidence that any one of them, individually, had been found to possess any lottery tickets. The evidence, however, justified the inference adopted by the Court that they, and each of them, were co-conspirators, knowingly cooperating with each other in this lottery operation.

Judge Manley said:

> "Now, when we come to the people in the basement, we have an entirely different situation. They were all down there participating in this operation, which seems to be right large. So, I think they should be handled differently" (App. 38).

Judge Manley then proceeded to impose a fine of $1,000 on each of the defendants, shown by the evidence to have been found in the basement, seated around the little tables shoved together; namely, Walter Rouse, Frank Reddish, Henry Baker, Joseph Quill, Morris Fox, Randolph Fortune, John (James) Payne, Carlo Hutchins, Noland Clark, Charles Dodson and Clyde Martin (App. 38-39).

After imposing said sentences, Judge Manley explained same as follows:

> "I might say I look upon this case as being different from the ordinary case where the person is picked up on the street or in the store somewhere, a pick-up station where he is writing numbers, and the fine has usually been a hundred dollars, that is the first time he had been in this Court this year. But this case is entirely different, and while I have been lenient in the other type of case, I think in a case like this I should strictly enforce the law because this probably may be

an opportunity to break up the headquarters of an organization that is probably spread out all over the city, and the only ones Captain Emerson got there were probably the pick-up men who had all these tickets in their possession, and who come there from the turn-in posts spread throughout the city" (App. 39-40).

Despite the fact that Walter Rouse had thus paid the full penalty for the lottery conspiracy, inferred from the circumstances found present in the basement at 2006 West North Avenue on November 19, 1949, the State later saw fit to re-indict him for the same conspiracy, identical as to time, place, circumstances and co-conspirators.

It is true, the Indictment No. 3393 of 1951, in the instant case to wit; charged the Petitioner, together with William Adams with a conspiracy allegedly continuous from August 1, 1947 until August 15, 1951; but the fact is that at the trial of said Indictment the evidence related only to circumstances found by Captain Emerson in the basement at 2006 West North Avenue, on November 19, 1949, no evidence was proffered to show any act or conduct on the part of the Petitioner, or any other person or thing, and could only be inferred from the circumstances presented on that single day, as testified to in said trial on March 20, 1949.

William Adams was named as co-defendant in the indictments in the earlier case. The fact that two locked boxes were found in the basement containing 97,000 numbers and 96,000 numbers, respectively, was also in evidence in the earlier trial.

"(Mr. Murrell) You have got Mr. Roush now, who has pled guilty to everything. You have got two boxes there that are full of thousands of lottery slips. If he has pled guilty generally to all of these days, then

Captain Emerson ought to get those two boxes into evidence now with respect to what was found on the premises.

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"(The Court) He has included those, if you want to offer them in evidence I imagine that will be all right, too.

"(Mr. Murrell) The one box contains lottery slips for November 17, and the other contains lottery slips for November 18th. One box has 97,000 numbers in it, the other has 96,000 numbers in it" (App. 36-37).

Hence, whether or not, as testified by Captain Emerson in the instant case, he obtained the keys to said two boxes from said William Adams, while in the basement in question at the time of the search, and that Walter Rouse must have known it, is immaterial in determining the nature and extent of the crime proven in both cases.

In *Sealfon v. United States*, 332 U. S. 575, 578, the law as to successive prosecution for both a substantive offense and a conspiracy to commit is well stated, as follows:

"It has long been recognized that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. *Pinkerton v. United States*, 328 U. S. 640, 643. Thus, with some exceptions one may be prosecuted for both crimes. *Ibid.* But res judicata may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings. (*United States v. Oppenheimer*, 242 U. S. 85, 87; *United States v. De Angelo*, 138 F. 2d 466, 468; 147 A. L. R. 991; see *Frank v. Mangum*, 237 U. S. 309, 334), and operates to conclude those matters in issue which the verdict determined though the offenses be different. See *United States v. Adams*, 281 U. S. 202, 205."

In the above case the Supreme Court at page 580 said:

> "* * * The basic facts in each trial were identical. As we read the records of the two trials, petitioner could be convicted of either offense only on proof that he wrote the letter pursuant to an agreement with Greenberg. Under the evidence introduced, petitioner could have aided and abetted Greenberg in no other way. Indeed, respondent does not urge that he could. Thus the core of the prosecutor's case was in each case the same: the letter, and the circumstances surrounding it and to be inferred from it, and the false invoices. * * * It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do."

To paraphrase the above language, the Instant Case, (CONSPIRACY) was a SECOND PUNISHMENT, by the State of Maryland, for a combination, confederation and completed agreement to violate the Lottery Laws, which was or should have been concluded when the judgments and sentences were imposed by the Court at the trial of the SUBSTANTIVE OFFENSE OR OFFENSES.

The facts and circumstances of the instant case, wherein the "Conspiracy" is solely inferred, are in keeping with the attendant dangers, so ably depicted by Mr. Justice Jackson, in his concurring opinion, in Krulewitch v. United States, 336 U. S. 440, whereat page 456, Mr. Justice Jackson said:

> "I do not see the slightest warrant for judicially introducing a doctrine of implied crimes or constructive conspiracies. It either adds a new crime or extends an old one. True, the modern law of conspiracy was largely evolved by the judges. But it is well and wisely settled that there can be no judge-made offenses against the United States and that every federal prosecution must

be sustained by statutory authority. No statute authorizes federal judges to imply, presume or construct a conspiracy except as one may be found from evidence. To do so seems to approximate creation of a new offense and one that I would think of doubtful constitutionality even if it were created by Congress. And, at all events, it is one fundamentally and irreconcilably at war with our presumption of innocence.

"There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evil-doing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges. We should disapprove the doctrine of implied or constructive crime in its entirety and in every manifestation. And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction."

CONCLUSION

It is respectfully submitted that the Constitutional Guaranty of Due Process of Law provided by the FOURTEENTH AMENDMENT to the CONSTITUTION OF UNITED STATES demands the reversal of the judgment and sentence in the Instant Case. That Furthermore, the Writ of Certiorari should be issued so that the practice adopted by prosecutors as shown by the Record Herein may be condemned in no uncertain terms. Otherwise the penalties provided by State Legislatures for SUBSTANTIVE OFFENSES may be circumvented by over-zealous public prosecutors who may obtain a conviction for the SUBSTANTIVE OFFENSE, secure an augmented sentence by reason of the CONSPIRACY shown therein, and then reindict, charging CONSPIRACY, using the

same evidence and demanding additional sentence therefor (As was done in the Instant Case).

This, we submit, is a violent distortion of the accepted doctrine that a Conspiracy, already completed, is a separate offense from the object of the Conspiracy.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 270

WALTER ROUSE,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner was indicted on a charge of conspiracy with one Willie Adams and others from August 1, 1947 to August 15, 1951 to violate the lottery laws of the State of Maryland. In the nisi prius court, a severance was granted to Walter Rouse and he was tried and convicted by a jury. At the outset of the trial, Rouse filed a Motion to Dismiss (R. 3). This Motion to Dismiss was based upon a defense of former jeopardy. However, upon hearing before the Court of Appeals of Maryland, Rouse argued on the basis that said Motion included the defense of res judicata in view of the

fact that he had previously been charged with certain substantive violations of the Maryland lottery laws, and had pleaded guilty thereto. The previous offenses were charged by indictments which set out certain violations, such as "possession of lottery paraphernalia", etc., and did not include any count charging a conspiracy or unlawful combination or confederation. On June 11, 1953, the Maryland Court of Appeals rendered an opinion (Hammond, J.) affirming the judgment and sentence of the court below, which opinion appears in the Record of the within case, beginning at page 63.

QUESTION PRESENTED

The sole question presented by the petition herein is whether or not a conviction, under a plea of guilty, of a substantive crime amounts to res judicata as to a subsequent prosecution for conspiracy involving, among other things, the substantive crime punished under the previous conviction.

STATEMENT OF THE FACTS

The facts as they appear in the Record show plainly and clearly that Petitioner had been engaging in the lottery business, known as the "numbers game", in the State of Maryland, together with numerous others, for an extended period, and was finally caught in the course of a raid upon certain premises in Baltimore on November 19, 1949. He was then with others charged with substantive violations of the lottery laws of the State of Maryland occurring on that particular day, and pleaded guilty to the said charges. He was subsequently indicted on August 24, 1951 for unlawfully conspiring with one William Adams and certain others to violate the lottery laws of the State of Maryland,

the period of said conspiracy being stated in said indictment as from August 1, 1947 to August 15, 1951 (R. 2 and 3). The evidence in the case consisted of testimony of the arresting officer (R. 6), showed that at the time of the raid there were seized 24,494 lottery slips, 268,182 lottery numbers, $15,807.35 played on them, representing 907 writers, 47 lottery tapes amounting to $27,477.21, making a grand total of money played of $43,284.56. Numerous others who were arrested at the same time testified in the conspiracy case, although not charged therein most of them having been employees or assistants of Rouse. Testimony was almost unanimous as to the fact that the "numbers game" had been going on for at least several days at this particular location and that, upon their conviction at the earlier trial, all of their fines were paid by Rouse as well as the expense of their bail bonds.

There can be no doubt whatever that Petitioner herein is guilty as charged, unless his present contention that his prosecution was barred under the doctrine of res judicata can be maintained.

ARGUMENT

THE FORMER CONVICTION OF A SUBSTANTIVE CRIME DOES NOT, ON THE THEORY OF RES JUDICATA OR DOUBLE JEOPARDY, BAR PROSECUTION FOR CONSPIRACY TO COMMIT THE CRIME.

It has long been recognized both by the courts of Maryland and by this Honorable Court that an acquittal of a particular crime does not bar a subsequent prosecution for a conspiracy to commit the crime. *Scarlett v. State,* .... Md. ...., 93 A. 2d 753; *Gilpin v. State,* 142 Md. 464, 121 A. 354; *Pinkerton v. United States,* 328 U. S. 640, 90 L. Ed. 1489; *Sealfon v. United States,* 332 U. S. 575, 92 L. Ed. 180.

While it cannot be disputed that the principle of res judicata applies in criminal cases, the Petitioner's contention is that the evidence used to convict him in the conspiracy was identical with that used in the trial on the charge of commission of the substantive crimes. This claim is inaccurate in fact, because a cursory glance at the record will show that additional evidence to establish the conspiracy was introduced in the second trial greatly in excess of that required to prove the offense beyond all reasonable doubt. Furthermore, the present case differs from some of those cited above in that, in this case, the Petitioner was not acquitted at the previous trial, but was actually convicted on a plea of guilty on two of the substantive offenses therein charged. Appellant has only cited two cases as authority in his Brief, namely, *Sealfon v. United States, supra;* and *Kruelewitch v. United States,* 336 U. S. 440, the first of which bears out the contention of the Respondent herein as to the general principle that the substantive offense and a conspiracy to commit it are separate and distinct offenses, and the case was reversed only because, in order to prove the second offense it was necessary to prove an agreement which had been necessarily adjudicated to be nonexistent at the former trial. This is, of course, a proper application of the doctrine of res judicata, but is entirely distinct from the facts in the case at bar.

The *Kruelewitch* case, *supra,* is not applicable to the facts of the present case, determining only that Federal prosecutions must be sustained by statutory authority and a question of hearsay evidence in the nature of a statement made by an alleged co-conspirator. A cursory examination of the facts of the *Kruelewitch* case will indicate that it has nothing whatsoever to do with the case at bar.

In Petitioner's Brief, he states under "Reasons Relied on for Granting Writ", that the Maryland Court of Appeals ignored the fact that the trial court, in fixing sentence, had increased same ten-fold over what it customarily imposed. This statement not only has nothing to do with the present contention of the Petitioner, but does not even appear in the Record as a fact. Further, in Petitioner's Statement of the Case (p. 6 of his Brief), it is stated that the evidence in the trial of the instant case was identical as to the facts proven with that in the earlier trial, which does not appear in the Record, as there was a great mass of additional evidence presented at the second trial, as can readily be understood, not only for the reason that the proof required to show conspiracy must be different from that to show the commission of a substantive offense, but also ignores the fact that Petitioner pleaded guilty at the earlier trial. Petitioner's further statement on page 6 that Defendants were expressly punished for a combination and confederation in the nature of a conspiracy at the earlier trial does not appear in the Record, and, as a matter of fact, no such charge or indictment was made against them at that time.

It is obvious from the Record that the State has proven the conspiracy charged in this case, not by relying solely upon the identical evidence presented in the previous case, but by re-introducing that testimony for whatever it might be worth as part of the whole proof, and adding thereto sufficient additional testimony not used before to prove conclusively Petitioner's guilt of conspiracy as charged. The Court is respectfully referred to the opinion of the Court of Appeals of Maryland (Hammond, J., R. 63) which exhaustively considers the various facets of the law as applied to the within case and present Petitioner's contentions with respect thereto.

CONCLUSION

It is respectfully submitted, for the reasons stated herein, that the Petitioner has not been denied due process of law or any other right accorded him under the Constitution of the United States or any statute passed pursuant thereto, and that the Petition should therefore be denied.

Respectfully submitted,

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